1986

Robert F. Blackburn, Jr. v. Carol J. Blackburn Moyes : Reply Brief

Utah Court of Appeals

David J. Berceau; Makoff & Berceau; Attorney for Respondent.
David A. McPhie; Hintze, Brown, Faust, Blakesley & McPhie; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

ROBERT F. BLACKBURN, JR., Plaintiff-Respondent,	)	
v.	)	Case No. 860202-CA
CAROL J. BLACKBURN MOYES, Defendant-Appellant.	)	Priority No. 15

APPELLANT'S REPLY TO RESPONDENT'S BRIEF ON APPEAL

AND

APPELLANT'S BRIEF IN RESPONSE TO RESPONDENT'S CROSS APPEAL

Appeals from Two Separate Judgments of the Third District Court
in and for Salt Lake County, State of Utah
Honorable Scott Daniels

DAVID A. McPHIE
HINTZE, BROWN, FAUST, BLAKESLEY
& McPHIE
3450 S. Highland Drive, Suite 301
Salt Lake City, Utah 84106

Attorney for Defendant-Appellant

DAVID J. BERCEAU
MAKOFF & BERCEAU
39 Post Office Place, Suite 200
Salt Lake City, Utah 84101

Attorney for Plaintiff-Respondent

IN THE UTAH COURT OF APPEALS

ROBERT F. BLACKBURN, JR.,	)	
	)	
Plaintiff-Respondent,	)	
	)	
v.	)	Case No. 860202-CA
	)	
CAROL J. BLACKBURN MOYES,	)	
	)	Priority No. 15
Defendant-Appellant.	)	

APPELLANT'S REPLY TO RESPONDENT'S BRIEF ON APPEAL

AND

APPELLANT'S BRIEF IN RESPONSE TO RESPONDENT'S CROSS APPEAL

Appeals from Two Separate Judgments of the Third District Court
in and for Salt Lake County, State of Utah
Honorable Scott Daniels

DAVID A. McPHIE
HINTZE, BROWN, FAUST, BLAKESLEY
& McPHIE
3450 S. Highland Drive, Suite 301
Salt Lake City, Utah 84106

Attorney for Defendant-Appellant

DAVID J. BERCEAU
MAKOFF & BERCEAU
39 Post Office Place, Suite 200
Salt Lake City, Utah 84101

Attorney for Plaintiff-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTORY AUTHORITY FOR APPEAL

Section 9, Article 8 of the Constitution of the State of Utah

Section 78-2a-3, Utah Code Annotated (1953 as amended)

STATEMENT OF ISSUES PRESENTED ON APPEAL

Appellant's reply brief to respondent's brief on appeal and the appellant's brief in response to respondent's cross-appeal are both contained herein.

In both briefs, appellant has directed her argument to the issues outlined by the respondent. Therefore, there is no new statement of the issues with regard to the appellant's appeal, other than those contained in her original appellant's brief.

The respondent's cross-appeal is so short so as to make a reframing of issues unnecessary.

NATURE OF PROCEEDINGS

This is an appeal from the decision of the Third District Court, Judge Scott Daniels, on a petition to modify a decree of divorce, argued March 5th-6th, 1985. The appellant, custodial parent, Carol Blackburn (Moyes), asks this court to reverse the lower court's decision to deny her a judgment for arrearages in

child support.

The respondent subsequently petitioned the lower court to reduce his child support obligation. He cross-appeals the lower court's decision, claiming the lower court did not reduce his child support obligation enough. The respondent requests that the court further reduce his child support obligation, or remand the matter for the same purpose.

STATEMENT OF THE CASES

The two briefs herein contain no new statement of the facts.

SUMMARY OF ARGUMENT

No new summary of the arguments presented herein has been provided. The appellant's reply brief on her appeal responds only to new points contained in the respondent's brief. The respondent's cross-appeal brief and the reply contained herein, are both sufficiently short as to not warrant a summary of the arguments contained therein.

DETAIL OF ARGUMENT

APPELLANT'S REPLY BRIEF

ISSUE I

A. STANDARD OF REVIEW The plaintiff-respondent argues, under the standard of review portion of his responsive brief, beginning on page 9 thereof, that Rule 52(a) of the Utah Rules of Civil Procedure governs the overturning of lower court findings of fact. With this proposition, the appellant agrees. Rule 52(a) provides that findings of a lower court should not be set aside unless they are clearly erroneous.

The appellant does not argue that the lower court's findings of fact were clearly erroneous as to what happened. The appellant, however, does not believe that the preponderance of the evidence supported a finding by the court that agreements were made between the parties to forgive a child support obligation.
Appellant simply argues that a more reasonable conclusion to have come to, considering all of the testimony, would have been to conclude that the appellant acquiesced in the face of her former husband's aggressive insistence on terms and conditions of her being able to leave the State of Colorado. The wealth of detail in the respondent's testimony concerning all of the things he said and all of his plans, thoughts and assumptions, does not effectively negate the appellant's simple statements that she never made an "agreement" to reduce child support with the respondent. Appellant requests of the court that they consider the possibility that acquiesence is a more reasonable interpretation of the testimony

and is more consistent with that testimony than an interpretation which requires one to believe that the appellant simply perjured herself. The appellant, however, does not argue that the courts finding was clearly erroneous.

What the appellant argues is that the application of the law to the facts by the lower court was in error. This is recited and argued in appellant's brief, beginning on page 14. The courts findings, as they apply the law to the facts, are internally inconsistent and incongruent. The court below was apparently confused as to what point in time is used as a reference point in determining what is future child support and what is arrearage. Both of the agreements Judge Daniels found were made, were as to then future child support. They were only arrearages with respect to the trial date. When the lower court stated in its finding numbered 3: "...defendant does not have the power to waive future payments from this time forward, in that they are not her to waive. They belong to the children." The court failed to recognize that the mother-appellant was in the same position at the time of the "agreement" to waive then future payments.

B. The respondent argues, commencing on page 10 of his brief that, in fact, a person may be estopped to collect reimbursement for child support arrearages. With this simple proposition, the appellant also agrees. Appellant, in her own brief, argues that estoppel as a defense for the non-payment of child support should exist, but only in limited circumstances.

Those limited circumstances should be those where the purported acts upon which the obligor relied were: 1) not an agreement; and 2) especially not an agreement to forgive then future child support payments.

In this case, both of the alleged agreements were to forgive a then future child support obligation. Neither was to forgive a then arrearage. Appellant's position is that the doctrine of estoppel is a defense which is alive and well and available to a child support obligor, but only as to back child support obligations which, at the time of the alleged agreement, were then arrearages. The case law is clear that the parties are incapable of making an agreement, either oral or in writing, to forgive then future child support without prior approval of the court.

Respondent contends that appellant made an agreement in the fall of 1979 to reduce child support from $400.00 per month to $120.00 per month, and to allow the respondent, from that time forward, to no longer pay $320.00 of the court ordered $440.00 child support. This $320.00 per month had been previously paid by respondent in the form of a house payment. Such an agreement, if looked at then, was then as to future payments due. It was not in writing and was not approved by the court. It, therefore, violated public policy because it was prohibited by common law, and was void, ab initio. Our courts have ruled these agreements are void and of no effect. The question is not whether there was an arrearage at the time of trial. There clearly was. The only

question is as to whether or not the "agreement" allegedly made was as to then arrearage or future payments.

Similarly, respondent alleges that later, in Provo, Utah, the parties entered into a written agreement memorializing their earlier agreement, entitled Revised Child Support Agreement. Again, this agreement was then as to future support. Said document does not even purport to contain a written agreement between the parties to forgive what were then arrearages, but was a document to be controlling in the future. It was not approved by the court, the court was eliminated from the review process as to that change in the terms of the decree. The question, again, is not whether those amounts were arrearages at the time of trial in March, 1985, but whether the agreement was as to then future child support to become due. If the "agreement" was as to then future payments, the "agreement" is and was void for failure to be approved by the court. Therefore, no estoppel defense is available to the respondent on these facts.

C. There is no dispute between the parties concerning what the elements of estoppel in a child support case are. There are four: a) affirmative acts; b) reasonable reliance; c) change in position; and d) to ones detriment.

The appellant testified that she had conversations with the respondent in which he requested concessions from her in connection with her decision to sell the Colorado home and move to Provo, Utah. She further testified that over a period of years, she came

to expect that she could not get more money out of her former husband than he said he would pay her. The appellant testified that she never agreed to any of the reductions or demands that the respondent made, and her testimony to that effect was clear and unequivocal. The respondent stated his position to the appellant many times. She was not in the mood to fight with him. The respondent believed that his position was just, the appellant did not believe she would convince him to the contrary by fighting him. Although she did not agree, she avoided him and did nothing. The respondent, based upon his misunderstanding of the law, and his selfish views of fairness, came to believe that she had made an agreement when, in fact, she had not.

Similarly, the appellant later, after she had left and moved to Provo, Utah, signed a document which stated that the respondent would

> "...continue to pay Carol $120.00 for child support, with an added inflation adjustment as follows: in January of each year, the monthly payment will increase by $10, ie, beginning January, 1981, monthly payments will be $130; beginning January 1982, monthly payments will be $140, etc..." Revised Child Support Agreement, 11-13-80

Although his agreement is referred to as a memorial of the earlier agreement it, in fact, does not refer to any earlier agreement. It simply is a written document which purports to forgive, in advance, what were then future child support payments. This agreement was never approved by the court.

Again, the appellant testified that she signed this document because she believe that it was all she would get from the respondent, regardless of her efforts or protestations to the

contrary. She saw it as an opportunity to lock in some increases. Appellant's further testimony was the she did not understand this document to be a "giving up" of the $320.00 per month previously ordered by the Colorado court as child support, but paid in the form of a house payment, because it made no reference to that provision of the decree.

Appellant has never disagreed with or denied that she wrote letters requesting payment from the respondent of $120.00, or any other lesser amount as child support. What the appellant denies is that she ever agreed to give up her court ordered child support. The testimony of the appellant was that she had no hope of getting more out of her former husband than he had decided he would pay, and that to engage him in argument or litigation would bring her more frustration than money. Arguments by respondent that the appellant has admitted such an agreement, because she wrote letters in which she asked for amounts of money which were less than the child support ordered, are self serving. These letters were written after the appellant had been bullied into believing she should not and, therefore, would not get more.

D. Respondent argues on page 14 of his brief that the appellant, by her conduct and representations, prevented the respondent from taking their agreement in before the courts. When respondent asked at trial on cross examination what appellant had done to <u>prevent</u> him from taking the agreement before the courts, respondent replied that she had said that "...she did not want to

go back to court because she was in a hurry to sell the house, move, and enroll in September classes..." (at BYU). Respondent fails to bring to the attention of the court, in claiming he was prevented from going to court, that: 1) He did not need the cooperation of his former wife to go back to court. He could have filed a petition for modification and had his former wife served. He did not do this; and 2) The respondent would have had to explain to a Colorado court why it was fair to amend the decree of divorce to eliminate three quarters of the child support payment, simply because the plaintiff wanted to move from Colorado and attend school in Utah.

Appellant believes that respondent would have had a difficult time convincing the Colorado court, or any court, that appellant was obligated to stay in the home of the parties so that he could continue to enjoy a tax write off he had assumed was his, and which had little or no value. Similarly, appellant believes respondent would have had a hard time convincing the Colorado court that appellant was supposed to take her one-half of the equity in the house as child support and let the respondent get his one-half of the equity as his return on the investment. The argument that the appellant did anything to keep the respondent from taking his alleged agreement before the courts is without merit.

E. Again, on page 14, respondent argues that the appellant had a duty to speak up and object to the support checks which she received and endorsed. Respondent implies that if she

was not willing to accept the checks for $120.00 he was sending as payment in full, that she should have refused them. Respondent apparently believes that some type of accord and satisfaction was taking place, and that appellant should be estopped on the basis that by taking respondent's $120.00 per month payments she has waived her right to collect the amounts respondent did not pay at a later time. This is like the respondents argument that by talking about lower amounts in letters, the appellant had given her child support up.

This is why public policy, along with precedent, has resulted in Supreme Court decisions which require agreements to reduce child support prospectively be approved by court order. It is simply too easy for child support obligors to bully former wives into prospective reductions in child support. The instant case is a prime example.

Respondent argues that the appellant "intentionally acquiesced in the support amount of $120.00, because she had $13,000.00 in her pocket." Of course she did. One of the best opportunities for a former husband to bully a woman into acceptance or toleration of a reduction in the court ordered child support, is to press her at a time when she has some money and feels that she can get along without all of the ordered support. Respondent fails to point out that the $13,000.00 which the appellant had came from her one-half of the equity from the sale of the parties former home, and that respondent <u>also</u> received $13,000.00 for his one-half.

On page 15 of respondent's reply brief, he argues that it was reasonable for him to rely on the defendant's actions and to change his position because of them. The appellant's actions were that she had obtained a divorce from the respondent, she was awarded $440.00 per month as child support, $120.00 of which was paid directly to her and $320.00 of which was paid in the form of a house payment. Appellant indicated that she wanted to leave the state, go to BYU, and take the children with her. Respondent immediately told her that it was unfair for her to leave Colorado, and that he would lose tax advantages he had claimed on the home through claiming the interest paid on the home loan and the depreciation thereof. According to respondent, the appellant, in not jumping up and slapping him in the face and saying "No!", induced him, mislead him and caused him to reasonably rely on their "agreement".

Appellant now wishes that she had aggressively pursued going back to court at the time. Only then would she have realized that she did not have to "put up with" the imposition of such unfair terms in order to sell the house, get her equity, and leave the state. What the respondent relied on was his ability to bully his former wife into unfair terms. The terms were unreasonable. His reliance, if any, was unreasonable.

It is very important at this juncture to explain the difference between the language in the separation agreement documents which the parties signed prior to their divorce (which was the basis for the divorce), and the decree of divorce document.

The separation agreement which the parties signed prior to the decree of divorce, (Appendix "A") had a provision which stated in paragraph 12 thereof, that "No modification or waiver of any of the terms of this agreement shall be valid unless in writing and signed by both parties." This provision clearly stated that the parties could, at any time, and by written agreement, amend that separation agreement. It was not intended to be a provision allowing the parties to amend the decree of divorce, or any other document. No language granting the parties any such power exists in the decree of divorce. Respondent argues that because of the language in the separation agreement, the parties obtained the power to modify, by themselves, in writing, any portion of the decree of divorce subsequently entered.

It is not possible for parties, by private agreement, to eliminate the state, through the courts as a supervisor, overseer and protector of the children's rights. The parties could not then, and cannot now, by agreement, eliminate the requirement that agreements for the reduction of prospective child support be approved by the court. Public policy and Utah case law are clearly to the contrary.

Again, at the bottom of page 15 of his brief, respondent argues that a reasonable person would have believed that they could rely on the terms of the revised child support agreement entered into between the parties and had the authority to make written revisions of the separation agreement. Even if the status of the law were that parties could amend their decrees of divorce by

private agreement with regard to child support, it would not be reasonable for the respondent to believe that he could rely on the enforcement of such unfair terms. A reasonable person could not assume that his former wife could be forced to:

1. Stay in the home, giving up her right to move from it at will;

2. Not be able to sell and get her equity from the home, without making a concession of the loss of three quarters of her child support;

3. Give up child support as a penalty in order to obtain the freedom to move; and

4. Shift the burden of child support from the respondent to the appellant's mother, as a condition of allowing her to move and receive her equity in the home.

Again, if the parties had gone back to court at the time, this would have become abundantly clear to the respondent.

At the bottom of page 15 and the top of page 16 of respondent's brief, he argues that "Finally, a reasonable person would have believed his children, on the sum of $120.00 per month, were adequately supported, because the appellant had $13,000.00 in her pocket." The respondent had been ordered to pay the appellant $440.00 per month in child support. Provisions had been made that $320.00 of that child support obligation could be paid in the form of the payment on the home, the use and possession of which had been awarded to the appellant and the children. Respondent's argument suggests that the appellant should pay some penalty for

her choice to relocate.

Respondent argues on page 16 of the reply brief that he lost his visitation because of his reasonable reliance on the acts of the appellant. He did not. Appellant had freedom under the Constitution of the United States to move freely among the United States, and outside this country's boarders to travel and relocate at will. She made her desires known to the respondent. Her intentions were clear and unequivocal. The appellant was, and is, a fit mother. With this the respondent has agreed. Respondent made no claim that custody of the children should be changed in connection with appellant's leaving the state. His visitation rights remained the same. Increase in the difficulty of visiting was an unavoidable side effect of relocation.

If the respondent's argument is that a reduction in child support was reasonable because he was not going to be able to see his children as much, then he mistakenly believes that the payment of child support buys opportunity for visitation. If respondent was bartering visitation against child support, it was inappropriate. Visitation is not an appropriate estopple issue.

Respondent further argues that, by relying on his "agreement" with the appellant, he gave up a piece of property in which he was building equity. Again, this argument is without merit. Both parties were building equity in the home during the year between the time of the divorce and the time of its sale. Both parties lost the benefit of that investment upon the sale of the home, but respondent agreed to the sale and to the sale price.

Both parties received more than $13,000.00 as their share of the equity from that sale. Each of the parties was free to reinvest at any rate of return they could acquire. The respondent did not ask to cash out appellant's interest and retain the home as an investment, but rather, was satisfied to sell the home and get the equity. The argument that respondent should have been allowed to impose upon the appellant a reduction in child support to compensate him for the loss of his investment is an unreasonable argument.

Respondent argues that he gave up a $408.00 per month benefit when the home was sold. Appellant does not argue that the house payment was not $408.00 per month. The tax benefit, however, is not $408.00. The deduction may have been close to $408.00 per month if the payment was in the early part of the loan. However, the benefit of such a deduction, depending on the income of the parties would have been less than one-third of that, in terms of tax dollars saved. Respondent argues as though deductions are the equivalent of tax credits.

A fatal flaw in the reasoning of the respondent with regard to his tax benefits argument, is simply that during the year following divorce, respondent made approximately $20,000.00. But for the next four or five years he had no taxable income. A tax deduction would have been of no benefit to him anyway.

At the top of page 17, respondent argues the fourth element of estoppel, i.e., the showing of actual detriment. Respondent claims that he relied to his detriment such that it would be

unreasonable now to go back and enter a judgment against him for arrearages. In the material on page 17 of respondent's brief, not a single change in position for the worse is articulated. There is a reference to the injuries outlined in the third element on page 16 of the brief. The respondent did not lose visitation rights. His visitation became for difficult for him to exercise. This is not a loss which makes it unfair to grant a judgment for arrearages in child support.

If he had put the monies he had saved in child support, after bullying his former wife into not expecting it anymore, into an interest bearing account, he could pay it now, and actually have benefited by not paying. There is no showing that he experienced financial detriment because his wife left the State of Colorado. Respondent did give up his investment in the home, but at the same time, cashed out his investment, receiving its equivalent in cash. If he chose to not reinvest that money, or did not reinvest it as well, that was his own choosing. There was no showing that he lost money because he was cashed out of the home. Under these facts, the respondent has improved his position by not having paid child support.

The final argument of the respondent in reply to the brief of the appellant commences on page 17 of his brief, and continues over to page 18. It this argument, he claims that in Larsen, 300 P.2d 596 (Utah, 1956), the court approved estoppel as a defense when the parties had made an agreement to what was then, in time, going to be future child support payments. Such an interpretation

of Larsen flies directly in the face of the cases cited by appellant in her brief, and in which the courts have stated that future child support cannot be bargained away, and the cases which required that any attempt to affect the future child support obligation of a child support obligor must not only be in writing, but previously approved by the court.

Respondent further argues at the bottom of page 19 of his brief, that:

> "The trial court did not give the revised child support agreement document...subsequent to Carol Moyes leaving Denver, prospective or future application."

The court's published findings of fact and conclusions of law did estop the appellant from collecting what was then future support. The court stated that:

> "The evidence was clear that the from the testimony presented from the modification agreement that the intention was that she would only collect $120.00 per month. He would allow her to sell the house. He relied on that. And I think she was estopped from collecting back child support. However, I do not think estoppel applies to future payments...you can't waive future payments, really. They are not her rights to waive. They belong to the children."

The court below did, in fact, give the revised child support agreement of the parties future and prospective application with regard to child support to be owing from November 13th, 1980 (the date of the agreement, Appendix "C") forward. Those monies only became arrearages with respect to the time of trial. That Revised Child Support Agreement made no mention of forgiving a then arrearage. When the appellant went to court before Judge Daniels on March of 1985, her claim was simply that the parties could not

have, at the time in question, made a deal to barter away what was then prospectively owed. Similarly, the oral "agreement" in the fall of 1979 was as to future payments and no estoppel defense can arise. Therefore, it was not bartered away, and there were, at the time of trial, legitimately due and owing arrearages.

APPELLANT'S BRIEF ON RESPONDENT'S CROSS-APPEAL

ISSUE II

LOWER COURT FAILED TO FOLLOW STATUTORY FACTORS REQUIRED TO SUPPORT DOLLAR CALCULATIONS

Respondent has cross-appealed in this matter. Respondent appeals the outcome of trial on his subsequent petition for modification which was tried on the 31st day of January, 1986, and which was completed on the 13th day of February, 1986. In respondents cross-appeal, he argues that in reducing his support obligation to the appellant, the court did not comply with Section 78-45-7(2), Utah Code Annotated, 1953 as amended, which sets forth seven factors the court must consider in petitions for modification for a reduction in child support.

Appellant has difficulty in answering the cross-appeal of the respondent. This is because respondent has not had the proceedings of the modification trial from which he appeals transcribed.

Appellant agrees that there are statutory elements which should have been considered by the court. The appellant does, however, disagree with the respondent concerning error on the part of the court. Respondent argues on page 19 of his brief, that:

> "The court heard evidence from the respondent as to his income and ability to earn. No evidence was presented on the other factors of support."

There is no transcript before this court to indicate what evidence was presented and what was not. There being no transcript offered by respondent on cross-appeal, he can not document what evidence

was or was not presented at trial.

The respondent herein was the petitioner. The respondent was the one who alleged that there had been a change of circumstances which warranted a reconsideration of his child support obligation. It was the petitioner-respondent, Mr. Blackburn, who had the burden of both moving forward with the case, and of persuasion. The matter was tried to the court. If no evidence was presented on the other five factors bearing on the modification issue as claimed by respondent, then the respondent failed to meet his burden.

Considerable testimony and evidence was introduced at the time of trial concerning the actual income of the obligor, the respondent, and his ability to earn. A substantial amount of testimony established the fact that the respondent, subsequent to the sale of the home in Colorado, quit his job because he did not like the "hassle and pressure" associated with it. The evidence further showed that the respondent lived on the $13,000.00 equity his received out of the sale of the home, and by his own choice, experienced self-imposed poverty.

When asked what he did with all of his time during those many months (years) he was unemployed between the 1980 revised child support agreement and the trial date (1986), the respondent's only answer was that he "read books".

The failure of the respondent in this matter to have presented evidence on five of the seven elements outlined by

statute as being relevant, was the respondent's own fault. Respondent cannot now argue that the court failed to consider the five issues on which the respondent presented no evidence.

The revised child support agreement which respondent urges should have been adopted by the court as evidence and a guideline on the issues of the needs of the children, was, at the time of hearing, more than five years old, and was never offered to the court as evidence of the needs of the children. The respondent had no duty of support to any other children or person.

Appellant was home with young children under the age of five years, and unable to work. Her husband, Jack Moyes, was unemployed as of the time of trial. All of these factors led the court to conclude as it did in the matter, as follows:

> "1. The court finds that there has been a material change of circumstances which has occurred since the decree of divorce was entered in this matter, in that the plaintiff is not now employed, whereas, he was employed at the time the decree of divorce was entered in Colorado.
>
> 2. The court finds that the plaintiff has sufficient earning capacity to pay $165.00 per child, per month, as child support for a total child support obligation of $330.00 per month..."

These findings show that the court understood that the plaintiff was unemployed at the time. They also show that the basis for a reduction in child support was a loss of income. The findings also show, however, that the court felt the preponderance of the credible evidence showed the respondent to have sufficient earning capacity to pay the reduced amount of $165.00 per child, for a total of $330.00 per month.

With no transcript, respondent cannot demonstrate that these findings are clearly erroneous as outlined in Rule 52a, Utah Rules of Civil Procedure.

Again, it was respondents burden to put on all of the evidence he wanted considered at a trial on a reduction of his child support. If the court had insufficient evidence, respondent failed to meet his burden.

It is the respondents burden to demonstrate to this court on appeal that the lower court made clearly erroneous findings. This would require reference to a record of the proceedings, so that this court could see the clear error. The respondent has not provided any transcript of proceedings.

The findings of fact are not clearly erroneous. The best evidence is that the lower court considered properly all evidence presented.

Respondent argues, under a heading "Revised Child Support Agreement" on page 20 of his brief, that "The foreign decree permitted the parties to amend, in writing, signed by both parties." A review of the Colorado decree of divorce does not reveal any language which purports to allow the parties to amend it in writing, orally or in any other way.

The remainder of the respondent's arguments, to the effect that the Colorado court did not need to exercise control over the agreements of the parties, because they had turned such control over to the parties, fails because the document simply does not provide that. Nothing in the Colorado decree suggests that it was

designed for the purposes of allowing future modification by the parties of the child support obligation, without court approval.

CONCLUSION

Although the court's findings are not clearly erroneous as to whether the parties ever entered into an oral agreement, or as to the intention of the parties in entering into the subsequent Revised Child Support Agreement, the evidence suggests that the situation was one of insistence by the respondent and acquiesce by the appellant. Although Judge Daniels did not commit clear error in making the findings he did, his findings as they apply the law to the facts, are internally inconsistent and show a misunderstanding as to how the doctrine of estoppel is applied.

In determining what is prospective or future child support, and an agreement to reduce it, as opposed to what is an arrearage, and an agreement to forgive it, one must look at the respective obligations as of the time the alleged agreement was made. In the instant case, the oral agreement respondent alleges took place in the fall of 1979, was then as to a future child support obligation, not an agreement to forgive what were then arrearages. The subsequent Revised Child Support Agreement document signed approximately one year later, was again an agreement as to what would then have been future child support payments, not an agreement to forgive what would have then been arrearages. Although the estoppel defense may be available to the child support obligor who had an agreement to forgive what were, at the time the agreement was made, arrearages, it cannot apply to a future child support obligation. Any attempt to modify the terms of a decree of divorce as to a future child support obligation must be in writing,

submitted to the court, and approved in advance.

Respondent does not claim that he has ever entered into an agreement with appellant to forgive unpaid child support arrearages. When looking back at the child support amounts at issue in this matter, one must realize that all amounts which appellant seeks to obtain were yet to be paid, and were future amounts at the time the alleged agreements were made.

Appellant testified that she never agreed to a reduction in child support, but acquiesced when she realized that her former husband was not going to do more for her than he had said he would. Her acquiesence in the face of that, including the taking of the lesser amount sent her in child support and the writing of letters concerning it, are not the affirmative acts which constitute the basis of an estoppel, even if the estoppel argument were available to the respondent.

It was not reasonable for the respondent to rely on the acquiesence of the appellant. The demands he made on her in connect with "letting her" sell the house and leave the state, were not reasonable demands. One cannot rely on the unconscionable. If respondent had gone to court in Colorado, as he claims he wanted to, but cannot explain as to why he did not, the unreasonableness of his expectations and reliance thereon would have become clear to him. No court in this state, or in Colorado, would have allowed the respondent to withhold child support as a penalty for selling the house and leaving the state. Likewise, no court would have forced the appellant take her share of the equity in the home as

pre paid child support. There was no evidence that this was ever agreed on or considered by the court or the parties.

The respondent never changed position financially or economically because of the appellant's leaving in any way that hurt him. There was no evidence that he did. His children moving away, the selling of the home and the payment to him of his equity, and the loss of a tax deduction when he had no income, were not changes to his economic detriment. There is no hardship worked upon the respondent by allowing the appellant to now recover the child support which he should have paid. In fact, unless interest is awarded on the child support arrearage owed, the respondent is better off for not having paid it.

It was the burden of persuasion of the respondent at the subsequent hearing on his petition for modification to put on evidence with regard to all issues he believed relevant to his request for a reduction in child support. If the only evidence before the court at the time of that hearing were as to the respondent's income and earning ability, and not as to the other five elements suggested by Section 78-45-7(2), it was because the petitioner, with the burden to present evidence, failed to do so. In fact, evidence was presented to the court to the effect that the appellant was unemployed, that her husband was unemployed, and that the respondent's unemployed status was the result of self imposed poverty, and that the respondent had earning capacity sufficient to allow him to pay the reduced amount.

The Revised Child Support Agreement was not evidence from

which the court could deduce the needs of the parties children in a trial in 1985. There was no evidence that said agreement had anything to do with the needs of the children, even in 1980.

WHEREFORE, appellant prays that the judgment of the Honorable Scott Daniels, subsequent to the March 5th-6th, 1985 hearing denying appellant judgment for child support arrearages, be reversed, and that appellant be awarded judgment for $19,840.00 for arrearages arising in child support between August, 1979 and March 1st, 1985, plus interest on said amount from March 1st, 1985 to the date of this courts decision, at the judgment rate of 12% per annum.

Appellant further prays that this matter be remanded to the District Court for hearing on requests for costs of court and attorneys fees incurred in bringing and maintaining this appeal.

Appellant further prays that respondents cross-appeal be denied.

RESPECTFULLY SUBMITTED this 24th day of February, 1988.

David A. McPhie

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered two true and correct copies of Appellant's Reply to Respondent's Brief on Appeal and Appellant's Brief in Response to Respondent's Cross-Appeal, to attorney for respondent, David J. Berceau, at 39 Post Office Place, Suite 200, Salt Lake City, Utah on February 24th, 1988.

David A. McPhie

STATE OF COLORADO

Civil Action No. D-20328

Division 1

In re the Marriage of:	
CAROL JEANNE BLACKBURN,	
Petitioner,	
and	SEPARATION AGREEMENT
ROBERT FARRIS, BLACKBURN, JR.,	
Respondent.	

THIS AGREEMENT, STIPULATION AND CONTRACT entered into this 18th day of December, 1978, by and between Carol Jeanne Blackburn, the Petitioner, hereinafter referred to as "Wife" and Robert Farris Blackburn, Jr., the Respondent, hereinafter referred to as "Husband"; and

WHEREAS, Petitioner and Respondent herein have instituted their action in the District Court in and for the County of Arapahoe, State of Colorado, being Civil Action No. D-20328; and

WHEREAS, the Petitioner and Respondent have separated, and are not living together as Husband and Wife; and

WHEREAS, it is the mutual desire of the parties that a full and final adjustment of their property rights, interests, and claims be settled and determined by the parties to this Agreement, and that the provision be made for the custody and support of the unemancipated minor children of the parties; and

WHEREAS, each of the parties has read and fully understands the terms, conditions and provisions of this Agreement, believes its terms to be fair, just, adequate and reasonable and freely and fully accepts the provisions, terms, and conditions thereof.

NOW THEREFORE, in consideration of the parties and the mutual covenants and agreements herein contained, receipt and sufficiency whereof is hereby acknowledged by each of the parties hereto, the parties mutually agree, stipulate and covenant as follows:

1. RELEASE

That except as specified in this Agreement, each party hereto is hereby released and absolved from any and all obligations and liabilities for the future acts and duties of the other, and that each of said parties hereby releases the other from any and all liabilities, debts, or obligations of any kind or character incurred by the other, from and after this date, and from any and all claims, demands, including all claims of either party upon the other for maintenance of Wife or Husband or otherwise, it being understood that this instrument is intended to settle the rights of the parties hereto in all respects, except as hereinafter provided.

2. AFTER ACQUIRED PROPERTY

That any and all property acquired from and after the date hereof shall be the sole and separate property of the party acquiring the same, and each of said parties hereby respectfully grants to the other all such further acquisitions of property as the sole and separate property of the one so acquiring the same.

3. ESTATES

That each of said parties shall have immediate right to dispose of by Will, his or her respective interest in any and all property belonging to him or her, or hereafter acquired by either of the respective parties, and each of the parties hereto hereby waives any and all rights to the estate of the other, including the right to widow's allowance, or any other rights

4. SEPARATION

The parties may and shall continue to live apart for the rest of their lives. Each shall be free from interference, direct or indirect, by the other as fully as though unmarried. Each may for his or her separate benefit, engage in any employment, business or profession he or she may choose.

5. PROPERTY

The parties make the following disposition and settlement with respect to their property.

A. Real Property

The parties are the joint owners of a residence located at 6518 South Dahlia Circle, Littleton, Colorado. That real property will remain as the joint property of the parties until such time in the future as they choose to sell or otherwise dispose of the property.

The Husband will make the house payment as indicated below until such time as the house is sold.

If the property is jointly owned at the time of the death of one of the parties, the deceased's interest shall pass to the children of the parties. The parties acknowledge that this Separation Agreement is not a Will.

B. Personal Property

1) The Wife will take as her sole property:

a) All of the personal belongings now in her possession;

b) The 1973 Volkswagen automobile;

c) All bank accounts in her name;

d) All interest in insurance policies in her name;

e) Two shares of Kodak Company stock, not in joint ownership with Husband;

f) The following items of furniture and

Four brown chairs -- wood, rocker, and upholstered
Ottoman
Cabinet humidifier
End table
China cabinet
Two twin beds
Two desks
Small wood bookcase
Small magazine rack
Three dressers
High chair
35mm camera
Garden cart
Electric lawn mower & cord
Bar-b-q Grill
Pioneer stereo receiver
Garard turntable
Two KLH speakers
Washer
Dryer
Refrigerator
White couch
Silverwear
Corningware dishes
Kitchen table & two chairs
Four bent wood dining room chairs
Typing table
All lamps except those named as Husband's property
Pendulum wall clock
Electric typewriter
Badminton set
Croquet set
Volleyball & net
Picnic table & benches
Picnic basket
Christmas tree & decorations
Girl's Schwinn bicycle
Assorted Garden and Lawn tools
Shop brooms
Folding lawn chair
Trash cans & cart
Six-foot aluminum ladder
All children's items
Double bed
Dresser with mirror
Wall mirror
Two yellow night stands
Parsons dining room table
Hide-a-bed couch
End table (round)
Director's chair
Tall metal bookshelves
Black wood bookshelves
Green bean bag chair
Blue antique chair
White antique trunk
Two pink suitcases
Black/white TV
Sewing machine & cabinet
Cabinet stereo & radio

Wicker phone stand
Kirby vacuum cleaner
Guitar
Antique Victrola
Cedar chest
Lennox china
Crystal water goblets
Instamatic camera
Numerous books
Numerous record albums
Crock pot
Pot and pan set
Wood tennis racket & press
Clothes hamper
Two clock radios

2) The Husband will take as his sole property:

a) All of the personal belongings now in his possession;

b) The 1967 Mercury automobile and the 1976 Ford Pickup;

c) All bank accounts in his name;

d) All interest in insurance policies in his name except that the Husband will maintain life insurance in an amount of at least $10,000.00 on himself and shall name either the Wife or the children as beneficiaries. If at such time as that policy is cancelled by mutual agreement between the parties the Husband shall retain all cash value of the policy.

e) U.S. Savings Bonds now in joint ownership with the Wife, of a value of approximately $360.00;

f) The following items of furniture and household goods:

White upholstered chair
Beige chair & couch
U.S. map
Electric sander
Floor lamp
End table
Green swag lamp
Metal file cabinet
Large metal bookcases
Brown cane table lamp
Flourescent light & extension cord
Two tennis racquets
Crank ice cream maker

Wood tool chest
Metal trunk
Two grey suitcases
Blue suitcase
Steam iron
Toaster
Ironing board (yellow & white)
GE canister vacuum
Manual Royal typewriter
Small B-BQ grill
Two tool boxes
Numerous tools
VTM electronic instrument
Encyclopedia Britanica
Numerous record albums
Binoculars
Instamatic camera
Trouble light
Extension cord (50')
Lawn chair
Miscellaneous pots & pans
Golf clubs
Oscillating fan
Pop corn popper
Short handled flat shovel

6. DEBTS

There are no outstanding joint debts of the parties other than the home mortgage which shall be paid by the Husband as set forth below.

7. CUSTODY OF THE MINOR CHILDREN

It is agreed that the Wife is a fit and proper person to have custody of the children and that she shall have custody of the minor children of the parties, subject to reasonable and liberal visitation rights of the Husband.

This provision is agreed to be in the best interests of the children at the present time.

8. CHILD SUPPORT

The Husband will pay support for the minor children as follows:

a) The Husband will make [redacted] which is presently approximately $320.00 each month, by making said payment directly to Mellon Mortgage Co., on or before the first of each month. This payment will include, and the Husband shall be responsible for, payments on the principal, interest, all taxes

[illegible] of these payments should increase, the Husband shall pay the increased amounts.

b) The Husband will pay directly to the Wife the sum of $120.00 on or before the 20th of each month.

c) The Husband will pay all medical, dental, and necessary orthondotia bills for the children and shall maintain health insurance for their benefit. The Wife will pay all costs for necessary medicines.

9. MAINTENANCE

Neither party shall pay maintenance to the other.

10. ATTORNEY FEES

The Husband shall pay to the Wife one-half the attorney fees and costs incurred by the Wife in this tion.

11. RELEASE FROM LIABILITY

The parties hereby mutually release and agree to hold harmless each other from all actions, claims and obligations which either of them had or may have against each other by reason of any cause up to the date of this agreement.

12. GENERAL PROVISIONS

No modification or waiver of any of the terms of this agreement shall be valid unless in writing and signed by both parties.

This agreement shall be governed by the laws of the State of Colorado.

This agreement constitutes the entire understanding of the parties. There are no agreements other than those set forth herein.

Each party acknowledges that he or she has read this agreement, has been fully informed about this agreement, understands this agreement, and is signing this agreement freely and voluntarily.

_____
CAROL JEANNE BLACKBURN, Petitioner

STATE OF COLORADO)
) ss.
COUNTY OF _____)

SUBSCRIBED and sworn to before me this _____ day of _____, 1978, by CAROL JEANNE BLACKBURN, Petitioner.

_____
Notary Public

My commission expires: _____

_____
ROBERT FARRIS BLACKBURN, JR., Respondent

STATE OF COLORADO)
) ss.
COUNTY OF _____)

SUBSCRIBED and sworn to before me this _____ day of _____, 1978, by ROBERT FARRIS BLACKBURN, JR., Respondent.

_____
Notary Public

My commission expires: _____

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF ARAPAHOE

STATE OF COLORADO

'78 DEC 18 PM 4:54

CLERK

In re the Marriage of:

CAROL JEANNE BLACKBURN
Petitioner

and

ROBERT FARRIS BLACKBURN, JR.
Respondent

CIVIL ACTION NO. D-20328

DECREE

(Dissolution of Marriage)

This matter was heard on its merits on December 18, 1978. Petitioner was represented by KENNETH K. STUART, attorney of record; respondent *(appeared by attorney of record) (did not appear in person or by attorney) (appeared by attorney appointed by the Court to represent appearing respondent) (appeared in person without counsel). The Court has examined the record, heard the evidence and the statements of counsel, and based thereon, makes the following findings:

1. The Court has jurisdiction over the parties and subject matter of this action.

2. One of the parties, Carol Jeanne Blackburn, has been a domiciliary of this state, for ninety days preceding the commencement of this proceeding.

3. The marriage between the parties is irretrievably broken.

4. The separation agreement between the parties, *(a copy of which is attached hereto as Exhibit A and incorporated herein as if set forth verbatim) has been considered by the Court and is not unconscionable as to support, maintenance, and property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that a decree of dissolution be entered, and the marriage between the parties hereto is hereby dissolved.

IT IS FURTHER ORDERED that the parties shall perform the respective provisions of the separation agreement, attached hereto as Exhibit A and incorporated herein as if set forth verbatim, as apply to each of them.†

IT IS FURTHER ORDERED that the custody of the minor children, DAVID JESSE BLACKBURN and GINA LORRAINE BLACKBURN, be granted to the Petitioner.

AND IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the C

the Respondent shall pay at least $ 440.00 per mo

support for the minor children.

IT IS FURTHER ORDERED THAT THIS COURT RETAINS SUCH JURISDICTION OF THIS ACTION AS IS PROVIDED BY LAW.

Dated this 19 day of December, 1978, at Littleton, Colorado.

Approved as to Fo

Attorney for Petitioner

DISTRICT JUDGE

Attorney for

REVISED CHILD SUPPORT AGREEMENT

IT IS HEREBY AGREED between these two parties, Carol Seiler Blackburn and Robert Farris Blackburn, Jr., in regards to their divorce decree and separation agreement dated December 18, 1978, that the following changes be made:

1. Robert will continue to pay Carol $120 per month for child support with an added inflation adjustment as follows: in January of each year, the monthly payment will increase by $10, ie, beginning January 1981, monthly payments will be $130; beginning January 1982, monthly payments will be $140, etc.

2. Robert will pay all travel expenses of the children and himself associated with his reasonable and liberal visitation rights.

3. Carol will take income tax deductions for the children so long as Robert is paying less than the IRS guidelines for monthly child support for qualifying exemptions.

4. Carol will purchase medical insurance for the children on a group plan and Robert will reimburse Carol for the cost difference (if any) between single and family rates.

5. Robert will continue to reimburse Carol for all the children's medical and dental bills (except orthodontia). Carol will continue to pay for all medicines for the children.

November 13, 1980
DATE

Carol Seiler Blackburn
CAROL SEILER BLACKBURN

Robert F. Blackburn Jr.
ROBERT FARRIS BLACKBURN, JR.